

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRIAN SALESIN,

Plaintiff-Appellant,

v

STATE FARM FIRE & CASUALTY  
COMPANY,

Defendant-Appellee.

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UNPUBLISHED

October 7, 2003

No. 239221

Oakland Circuit Court

LC No. 95-490551-CK

Before: Owens, P.J. and Griffin and Schuette, JJ.

PER CURIAM.

Plaintiff Brian Salesin appeals as of right the denial of class action certification. We affirm.

**I. FACTS**

This case arises out of defendant's improper withholding of overhead and profits from actual cash value and settlement payments to its policyholders. In January 1995, plaintiff filed a claim alleging he suffered a covered loss under his homeowner's insurance policy claiming defendant improperly denied complete coverage. Plaintiff had suffered water damage to his home due to a leaking washing machine hose. Defendant used its internal operation guide and withheld \$5,581.79 in contractor's profit and overhead.

Plaintiff's complaint alleged defendant "improperly withheld from his actual cash value payment money attributable to a general contractor's overhead and profit because he did not hire a general contractor." In July 1995, plaintiff filed a first amended class action complaint for declaratory relief. Plaintiff brought the claim on behalf of himself and all other policyholders of defendant "who suffered a covered building loss under a policy of insurance and State Farm [defendant] withheld money from an actual cash value settlement alleging it is for contractor overhead and/or profit . . . ."

Both parties stipulated that the trial court would first determine the motions for summary disposition and then would address the issue of class certification. The trial court granted summary disposition in favor of plaintiff, declaring that defendant had improperly deducted twenty percent of the replacement cost loss from payment of actual cash value building claims. The trial court denied defendant's motion for summary disposition and did not certify the action

as a class action. Plaintiff was granted judgment in the amount of \$5,581.79, as well as \$2,000 in attorney fees and \$1,192.53 in interest.

Defendant appealed the grant of summary disposition for plaintiff, the denial of summary disposition for defendant, and the award of attorney fees to plaintiff. Plaintiff appealed the denial of class action certification and the portion of the judgment that limited the award of attorney fees to \$2,000. This Court affirmed the grant of summary disposition for plaintiff and the denial of summary disposition for defendant, and remanded the matter to the trial court for a proper consideration of class action certification and attorney fees and costs. On remand, the trial court denied plaintiff's motion for class certification because plaintiff could not satisfy the second requirement of MCR 3.501(A), commonality. Plaintiff now appeals.

## II. STANDARD OF REVIEW

An order granting or denying class certification is reviewed for clear error. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 556; 492 NW2d 246 (1992). A trial court's findings "are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

## III. CLASS ACTION COMMONALITY REQUIREMENT

Commonality, MCR 3.501(A)(1)(b), "requires that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002), quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). Commonality "is concerned with whether there 'is a common issue the resolution of which will advance the litigation.'" *A&M, supra* at 599, quoting *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998). Also, a plaintiff must provide some basis "that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A&M, supra* at 600. Importantly, this Court in *A&M*, stated, "To be clear, the question is not whether each member of the class has sustained an identical *amount* of damage . . . but, rather, whether 'the common issues [that] determine liability predominate.'" *Id.*, quoting *Bogosian v Gulf Oil Corp*, 561 F2d 434, 456 (CA 3, 1977). The trial court determined that this case failed to satisfy the commonality requirement of a class action. It stated:

Regarding the question of whether common questions of law or fact predominate over individual questions, the common question factor is concerned with whether there "is a common issue the resolution of which will advance the litigation[.] . . . It requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Zine, supra*[, 236 Mich App at 289]. However, in this matter, with the question of State Farm's liability for the overhead and profit payments already resolved by the Court of Appeals, the issues remaining are not subject to generalized proof, but involve

questions of individualized proof. Proving individual liability and damages would, in fact, require *only* individualized proofs.

Also, the court has reviewed Plaintiff's assertions of the predominating common questions of law or fact but finds that resolution of the issues raised by Plaintiff will not advance the litigation because even if the court resolved them in plaintiffs' favor, the court would still have to determine for each class member whether they were owed the overhead and profit and how much each individual was owed. Thus, these individual factual inquiries would predominate and would render the case unmanageable as a class action.

The court recognizes that there are likely many State Farm policyholders who are entitled to payments of overhead and profit that were improperly withheld by Defendant. However, under Michigan [sic] law, these claims must be brought as individual causes of action, not as part of a class action.

We find that the trial court did not commit clear error when it determined that because the issue of liability had already been resolved, there was no longer a common issue to bind the class and only individual issues regarding damages remain. Clearly, the issues applicable to the class as a whole have already been resolved and all that remain are those issues that are subject only to individualized proof.

Affirmed.

/s/ Donald S. Owens  
/s/ Richard Allen Griffin  
/s/ Bill Schuette